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BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

SP7
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SEP 19 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Petition on Behalf of the
Louisiana Public Service Commission
for Authority to Retain Existing
Jurisdiction Over Commercial Mobile
Services Offered Within the State of
Louisiana

PR File No. 94-SP5

Petition of the State of Ohio for
Authority to Continue to Regulate
Commercial Mobile Radio Services

DOCKET FILE COPY ORIGINAL

PR File No. 94-SP7

Petition of the Public Service
Commission of Wyoming for Authority
to Maintain Current Regulation of
Rates and Market Entry

PR File No. 94-SP8

To: The Commission

COMMENTS OF AIRTOUCH PAGING

AIRTOUCH PAGING

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September 19, 1994

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SUMMARY

AirTouch Paging is commenting on the petitions of the states of Louisiana, Ohio and Wyoming which seek authority to maintain certain state entry and tariff regulations for Commercial Mobile Radio Service ("CMRS"). AirTouch Paging opposes the petitions to the extent that they seek to include paging within the ambit of regulated services.

None of the three state petitions meets the burden of showing that the continued regulation of paging entry or rates is justified. Evidence regarding the state of competition in the cellular, mobile telephone or basic exchange services simply is not probative of any need to regulate paging. The amount of available paging spectrum, the number of paging carriers, the low barriers to paging entry and significant paging price competition, all serve to distinguish paging from other wireless services.

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Rates and Market Entry)

PR File No. 94-SP8

To: The Commission

COMMENTS OF AIRTOUCH PAGING

AirTouch Paging ("AirTouch Paging"), by its
attorneys, hereby submits its comments in response to the
Petitions of Louisiana,^{1/} Ohio,^{2/} and Wyoming^{3/} for authority

^{1/} Petition on Behalf of the Louisiana Public Service Commission for Authority to Retain Existing Jurisdiction Over Commercial Mobile Radio Services Offered Within the State of Louisiana, PR File No. 94-SP5 ("Louisiana Petition").

to continue to regulate Commercial Mobile Radio Services ("CMRS") in those states (collectively "Petitions").^{4/} The following is respectfully shown:

I. Statement of Interest

1. AirTouch Paging holds numerous Part 22 (Public Mobile) and Part 90 (Private Mobile) authorizations for paging stations throughout the United States. Currently, AirTouch provides service to in excess of 1.3 million paging units throughout the country. By industry estimates, AirTouch is one of the largest paging service providers and one of the fastest growing paging companies in the United States. As a carrier of long standing with operations throughout the U.S., AirTouch Paging has substantial experience with state regulatory schemes affecting wireless communications services.

^{2/} In the Matter of the Petition of the State of Ohio for Authority to Continue to Regulate Commercial Mobile Radio Services, PR File No. 94-SP7 ("Ohio Petition").

^{3/} State Petition for Authority to Maintain Current Regulation of Rates and Market Entry (Section 20.12), PR File No. 94-SP8 ("Wyoming Petition").

^{4/} Several other states filed Petitions to continue regulation over Commercial Mobile Radio Services: Arizona (cellular), California (cellular), Connecticut (cellular), Hawaii (paging and cellular), New York (cellular), and Wyoming (cellular and perhaps paging). AirTouch's parent firm, AirTouch Communications, is interested in and will file comments regarding the continuation of regulation for cellular. AirTouch Paging is not addressing Hawaii's Petition because it currently does not have any marketing presence in, or planned, for Hawaii which would be subject to regulation.

2. With specific reference to the states at issue here, AirTouch Paging provides travellers coverage^{5/} one-way paging service in Ohio and Louisiana,^{6/} and is planning to initiate CMRS in Wyoming.^{7/} In Ohio, AirTouch Paging holds a Certificate of Public Convenience and Necessity ("CPCN") issued by the Public Utilities Commission of Ohio.^{8/} AirTouch Paging also is currently in the process of building a statewide local private carrier paging (PCP) network and beginning to sell service in Ohio. AirTouch Paging intends to expand its Part 22 Texas statewide coverage to include some portions of Louisiana as well. Based upon its background and experience, AirTouch Paging has a substantial interest in, and basis for, informed comment in this proceeding.

^{5/} Travellers coverage is different than local coverage. Local coverage includes a sufficient number of transmitters to provide service in most populated areas within the market area. Travellers coverage includes a sufficient number of transmitters to cover those areas in which a traveller would need coverage -- e.g., airport and downtown area.

^{6/} AirTouch Paging currently has Part 22 and 90 facilities in Ohio and Part 90 facilities only in Louisiana.

^{7/} AirTouch Paging holds PCP licenses for which it qualifies for nationwide exclusivity, and expects soon to be licensed for a nationwide 50.12 KHz paired narrowband channel.

^{8/} Findings and Order in PUCO Case No. 91-1002-RC-ACE (November 27, 1991).

**II. STATES SEEKING TO RETAIN ENTRY
AND RATE REGULATION FACE A HEAVY BURDEN**

3. The Onnibus Budget Reconciliation Act of 1993^{9/} provides that "no state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile radio service."^{10/} The Budget Act, however, provides a transition mechanism by which a state may petition the Commission for authority to continue the regulation of the rates for any commercial mobile radio service. In order for the Commission to grant a state's request, however, the state has the burden to show that either:

(i) market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

(ii) such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such state.^{11/}

The Budget Act further provides that a state that has any regulation concerning rates as of June 1, 1993 and that wants to continue such regulation must file a petition to continue such regulation by August 10, 1994.^{12/}

^{9/} Pub. L. No. 103-66, Title VI, Section 6002(b), 107 Stat. 312, 392 (1993) ("Budget Act").

^{10/} Section 332(c)(3)(A).

^{11/} Id.

^{12/} Section 332(c)(3)(B).

4. Although the states have some discretion in determining the kind of evidence to be submitted to meet that first prong of Section 332(c)(3), the Commission has specified the types of evidence, information, and analysis it believes to be probative.^{13/} This evidence includes:

- (a) the number of CMRS providers and the types of service offered;
- (b) the number of customers and growth trends of each CMRS provider;
- (c) rate information;
- (d) extent to which the services are substitutable for services offered by other providers;
- (e) opportunities for new entrants, including barriers to entry;
- (f) specific allegations of fact regarding anti-competitive or discriminatory practices of CMRS providers;
- (g) evidence of systematic unjust and unreasonable rates or discriminatory rates; and
- (h) evidence of customer dissatisfaction with services.^{14/}

The Commission also confirmed that the state, not the CMRS providers, have the burden of proof that the statutory requirements for the continuation of state regulation of rates is warranted.^{15/}

^{13/} See Second Report and Order, FCC 94-31 (Released March 7, 1994) at ¶252.

^{14/} Id.

^{15/} Id. at ¶251. Interested parties have a right to comment on and reply to state petitions.

5. Eight states have filed petitions to continue some or all of their regulations for CMRS providers. AirTouch Paging has reviewed these petitions and concluded that three states -- Louisiana, Ohio and Wyoming -- are seeking relief that, if granted, arguably is broad enough to permit certain rate or entry regulation of paging service providers. Louisiana requests authority from the Commission to continue regulating the rates of CMRS providers without distinguishing paging from other categories.^{16/} Ohio requests broad authority from the Commission to "preserve the rights of Ohio and to ensure on a prospective basis that neither the amended Communications Act nor the FCC's orders preempt the current limited state regulation over rates and market entry."^{17/} Wyoming, while referring principally to cellular services in the text of its petition, includes non-cellular rate information in its filing, and at points refers to a desire to "maintain current regulation", which includes non-cellular services.^{18/} AirTouch Paging will address each of these Petitions separately.

**III. LOUISIANA HAS FAILED TO SATISFY THE STATUTORY
REQUIREMENTS TO CONTINUE ITS REGULATION OF PAGING**

6. The Louisiana Public Service Commission ("Louisiana PSC") currently regulates both entry and rates

^{16/} Louisiana Petition at p. 50.

^{17/} Ohio Petition at p. 2.

^{18/} Wyoming Petition, p. 1.

of all CMRS providers in Louisiana.^{19/} Louisiana is one of the more restrictive entry states in the nation.^{20/} The Louisiana PSC will award a CPCN to a paging carrier for a territory covered by an existing paging provider only upon a determination that "the existing service is inadequate to meet the reasonable needs of the public and that the person operating the same is unable to or refuses or neglects after hearing on reasonable notice to provide adequate service."^{21/} The Louisiana PSC is one of the few state regulatory agencies in the nation which has actively regulated CMRS rates and is currently contemplating rate of return regulation for cellular carriers.^{22/}

7. Regardless of the outcome of any determination on the ability of Louisiana to regulate cellular rates, the FCC must conclude that the Louisiana PSC has failed to prove the statutory requirements for the continued regulation of paging. In its Petition, the Louisiana PSC has provided scant evidence that continued regulation of paging is necessary to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory. Indeed, the

^{19/} See Louisiana Petition at p. 7. See also R.S. 45:1503.

^{20/} Other than Hawaii, all the other restrictive entry states have not filed Petitions with the Commission to continue their regulation.

^{21/} R.S. 45:1503(C).

^{22/} See Louisiana Petition at p. 28.

evidence that the Louisiana PSC provides with respect to paging is anecdotal at best.

8. For example, the Louisiana PSC argues that the market for CMRS services is not fully competitive and that CMRS providers may be charging unjust and unreasonable rates.^{23/} However, to prove this fact, the Louisiana PSC only cites to its own docket raising these questions solely as to cellular.^{24/} In fact, the Louisiana PSC does not even provide any evidence that cellular is not fully competitive or charging unjust and unreasonable rates.

9. The only reference that the Louisiana PSC makes to its regulation of paging is an order relating to A+ Beeper. The A+ Beeper Order, however, relates to whether an agent needed a CPCN, not whether it was acting in an uncompetitive manner or charging unjust or unreasonable rates.^{25/} The paucity of evidence from the Louisiana PSC on the paging industry in Louisiana leaves the FCC no choice but to assume that the paging market in Louisiana is not markedly different from other states. Generally, paging is characterized by relatively low barriers to entry, a variety

^{23/} Louisiana Petition at pp. 23-30.

^{24/} Louisiana Petition at p. 28 citing Louisiana Public Service Commission Minutes (July 13, 1994).

^{25/} If there has been a lack of competition in the past, it has probably stemmed from the very restrictive entry requirements of Louisiana law. The preemption required by the Budget Act will create additional competition and therefore check any possibility of unjust or unreasonable discrimination in rates in Louisiana.

of available spectrum, numerous facility-based competitors and vigorous price competition.

10. Accordingly, since the Louisiana PSC has failed to provide any evidence required by the statute, the Commission must deny the Louisiana Petition with respect to paging services.

IV. OHIO HAS FAILED TO SATISFY THE STATUTORY REQUIREMENTS TO BE ALLOWED TO REGULATE PAGING

11. The Ohio Public Utilities Commission ("PUCO") historically has regulated both entry and rates of CMRS providers. The PUCO, however, recently granted all cellular, paging, and mobile service providers a temporary waiver, until December 31, 1997, of the tariff and contract filing requirements.^{26/} Although not completely clear, the PUCO appears in its Petition to be requesting authority to continue its current rate and entry regulation, albeit temporarily waived.^{27/}

^{26/} Finding and Order, In the Matter of the Commission Investigation Into Implementation of Sections 4927.01 through 4927.05, Revised Code, as They Relate to Competitive Telecommunication Services, Case No. 89-563-TP-COI (dated October 22, 1993) at pp. 21-22.

^{27/} The PUCO at one point states that "this filing is being submitted to preserve the rights of Ohio." Ohio Petition at p. 2. In another paragraph, however, the PUCO states that "this filing is being submitted to ... ensure that on a prospective basis that neither the amended Communications Act nor the FCC's orders preempt the current limited state regulation over rates and market entry, as described above." Id. At even another point in the Petition, the PUCO states that

the Public Utilities Commission of Ohio
hereby submits this filing for the purpose of

12. If the PUCO is requesting authority to either continue its current regulatory regime or to preserve the rights without a subsequent request to reinstitute entry and rate regulation, the PUCO Petition must be rejected because it does not satisfy the statutory standard. The statute is plain that the states must provide evidence that market conditions fail to protect subscribers from unreasonable, unjust or unduly discriminatory rates. As mentioned above, the states bear the burden of proof on whether the statutory standard has been met. Accordingly, since the PUCO has failed to provide any evidence of a failure in market conditions, the PUCO Petition must be rejected.^{28/}

13. The PUCO could seek to petition the Commission and request authority at a later date if the requirements of the statute are met. What the PUCO appears to be requesting is the ability to forego that later

informing the FCC of the existing Ohio regulatory framework for regulating CMRS providers and to preserve Ohio's right to petition the FCC at some point in the future for the purpose of additionally regulating the rate and market entry of commercial mobile radio service providers in the State of Ohio. Id. at p. 6.

^{28/} The paging industry in Ohio is highly competitive. In most areas, there are at least three well funded and well run paging operations. Indeed, two of three largest paging companies in the United States have operations in the state, as well as some medium size paging businesses, such as USA Mobile.

showing. Under the statute, without the required evidence, this is clearly impermissible.

**V. ANY RELIEF GRANTED TO WYOMING
SHOULD NOT EXTEND TO PAGING**

14. As earlier noted, the relief being sought by Wyoming is unclear. Much of the Wyoming Petition focuses upon cellular service regulations and proceedings.^{29/} However, the request for relief can be read to encompass the maintenance of all current regulation, including those respecting paging. AirTouch Paging submits that Wyoming, like Louisiana, has failed to meet its burden of showing that rate and entry regulation of paging companies is required.

15. To the extent that the Wyoming PSC seeks to establish that existing market conditions do not adequately protect subscribers, it relies upon evidence pertaining to the cellular business,^{30/} basic telephone service,^{31/} improved mobile telephone service,^{32/} and rural radio service.^{33/} No specific discussion of any lack of paging

^{29/} See e.g., Exhibits 1, 2, 3, 4, 9, 10.

^{30/} See Wyoming Petition, p. 3 and Exhibits 1 and 2.

^{31/} Id. at Exhibit 3.

^{32/} Id. at Exhibit 5.

^{33/} Id. at Exhibit 6.

competition, or the need for paging rate regulation, is provided.

16. In sum, although the Wyoming Petition claims that the State's telecommunications industry and structure is "unlike any other state in the country", by virtue of the sparse population and the large geography, the PSC has failed to make an adequate case that the continued regulation of paging services is in the best interest of Wyoming. Indeed, if there are areas of Wyoming that do not enjoy competitive paging offerings, the answer would appear to be to reduce not maintain barriers to entry.

VI. CONCLUSION

17. The foregoing premises having been duly considered, AirTouch Paging respectfully requests that the Commission reject the Louisiana PSC and PUCO's Petitions and institute a Notice of Proposed Rulemaking seeking clarification of the phrase "other terms and conditions."

Respectfully submitted,

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September 19, 1994

CERTIFICATE OF SERVICE

I, Tana Christine Maples, hereby certify that I have this 19th day of September, 1994, caused copies of the foregoing Comments of AirTouch Paging to be delivered by hand, courier charges prepaid, or by first class, United States mail, postage prepaid, to the following:

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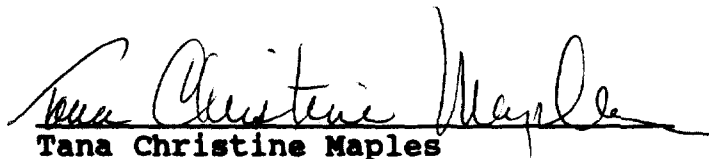
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